



**INSOL**  
INTERNATIONAL



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**PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023**

Commented [BB1]: TOTAL = 65/100 (mark adjusted upwards)

Summative Assessment (Examination)

Date: 16 - 17 November 2023

**Time limit: 24 hours (from 13:00 SAST on 16 November 2023 to 13:00 SAST on 17 November 2023)**

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Mr M Mpolokeng Dr E Levenstein Professor A Loubser Mr T Jordaan Ms R Webster  
Mr B Duma Mr D van der Merwe Mr C Rey Ms L Kahn Mr J Evans Ms J de Hutton  
Ms N Mabaso Mr P van den Steen Ms A Cohen Mr D Lake Ms J Mitchell-Marais  
Ms A Timme Mr S Smyth Mr C Strime

**MODERATORS**

Ms R Bekker Ms B Bennett Dr D Burdette Mr Z Cassim

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

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## INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 16 November 2023** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 17 November 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.SummativeAssessment**. An example would be something along the following lines: 202223-336.SummativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Due to the high incidence of load shedding currently taking place across South Africa, candidates are required to determine whether any load shedding is scheduled during the examination period and, if so, to make alternative arrangements to write elsewhere if at all possible.
7. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or to Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).

8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate's own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow.** When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.
9. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
10. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on the final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed. Please note that the model answers to this assessment will NOT be provided to candidates on the course after the assessment has been written.
11. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states *Type your answer here*). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
12. Since you have 24 hours within which to answer the assessment, it is suggested that you take the time to read through the assessment in its entirety before attempting to answer the questions.

## ANSWER ALL THE QUESTIONS

### QUESTION 1

Questions 1.1 - 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

Commented [M2]: Total for Q1: 15 marks.

#### Question 1.1

Choose the **correct** statement:

Sensational Cycles Proprietary Limited rents bicycles to tourists at the Cape Town promenade. Due to a decrease in tourism and cold, wet winter months, business is slow and the loans taken out by the Sensation Cycles from its bankers are now to falling due. You have been approached for advice to determine whether the company is a candidate for business rescue. Which of the following statements correctly describes the test for financial distress?

Commented [M3]: 1 mark

- (a) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due within the immediately ensuing six months.
- (b) It appears to be reasonably unlikely that the company will be able to pay the overwhelming majority of its debts as they become due within the immediately ensuing six months.
- (c) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- (d) Both (a) and (c) are correct.

#### Question 1.2

Choose the **correct** statement:

Unlike in some other jurisdictions which have debtor-in-possession regimes, in South Africa an independent person is appointed as the business rescue practitioner who supervises the company during its business rescue proceedings. Which of the following statements is correct?

Commented [M4]: 1 mark

- (a) During a company's business rescue proceedings, the business rescue practitioner consults with the board of directors and external advisors in preparing and implementing a business rescue plan to return the company to profitability.
- (b) During a company's business rescue proceedings, the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management.
- (c) During a company's business rescue proceedings, the business rescue practitioner is statutorily obliged to supervise the company together with the pre-existing management and the board of directors.
- (d) During a company's business rescue proceedings, the business rescue practitioner is not empowered to remove any of the company's pre-existing management.

**Question 1.3**

Commented [M5]: 1 mark

Choose the **correct** statement:

An application to court for the commencement of business rescue in respect of a company that is already in liquidation:

- (a) is not allowed by the Companies Act 2008.
- (b) may only be made before a final liquidation order has been issued.
- (c) may only be made before a provisional liquidation order has been issued.
- (d) may be made before the company is dissolved.

**Question 1.4**

Commented [M6]: 1 mark

Choose the **correct** statement:

The general moratorium is one of the critical components of business rescue because:

- (a) it affords the company in business rescue sufficient time to avoid paying its creditors for the benefit of its shareholders who own the company in business rescue as provided for in section 133 of the Companies Act of 2008.
- (b) it gives the company in business rescue sufficient breathing space to restructure its affairs by staying or prohibiting all legal proceedings against the company in business rescue in terms of section 130 of the Companies Act of 2008.
- (c) it gives the company in business rescue a period of respite to allow the company in business rescue to restructure its affairs by staying or prohibiting legal proceedings

against the company in question in terms of section 133(1) of the Companies Act of 1973.

(d) it gives the company in financial distress a period of respite to restructure its affairs by suspending or precluding legal proceedings against the company while in business rescue as stipulated in section 133(1) of the Companies Act of 2008.

(e) All of the above.

#### Question 1.5

Commented [M7]: 1 mark

Choose the **correct** statement:

Company X files for business rescue. Its only source of revenue is the proceeds of sales to its clients on credit. These debtors are ceded to X Bank as security for its loan to the company.

The company simply cannot survive if it does not have access to the proceeds of the payments by these clients from time to time. Under these circumstances, the business rescue practitioner may:

- (a) continue to utilise the proceeds of the debtors to operate the company as these debtors are not "property" as defined in the Companies Act.
- (b) approach the Court for an order to compel X Bank to consent to the company utilising the proceeds of these debtors in order to save the Company.
- (c) ensure that the total debtors' book does not decrease, by replacing every debtor receipt with at least an equal new sale to ensure that X Bank is not prejudiced by the continued use of the proceeds of the debtors to fund the ongoing operations of the company in business rescue.

(d) approach X Bank for their consent to utilise the proceeds of these debtors for the ongoing operations of the company.

#### Question 1.6

Commented [M8]: 0 marks

Choose the **correct** statement:

As at the commencement of the business rescue process, X Bank holds security by way of a registered general notarial bond over of all of the assets of a company in business rescue.

X Bank may:

- (a) take possession of the assets subject to its security and sell it in order to reduce the company's indebtedness to X Bank.

(b) insist that the business rescue practitioner obtain their consent before selling any of the assets subject to the general notarial bond, as provided for in section 134 of the Companies Act.

(c) not prevent the business rescue practitioner from disposing of the assets subject to the general notarial bond in the normal course of business by the company during business rescue proceedings

(d) seek an order of Court to perfect their security, without the consent of the business rescue practitioner, in order to protect their rights.

**Question 1.7**

Commented [M9]: 1 mark

Choose the **correct** statement:

A company is leasing the property from which it is conducting its business. The company is placed in business rescue and continues to conduct its business from the property. The landlord has a claim for arrear rentals that have been incurred whilst the Company is in business rescue. This claim ought to be classified as:

(a) a business rescue cost.

(b) post-commencement finance.

(c) a preferent claim.

(d) a secured claim.

(e) an unsecured claim.

(f) a damages claim.

**Question 1.8**

Commented [M10]: 0 marks

Choose the **correct** statement:

You are appointed as business rescue practitioner in a large manufacturing business and within the first few weeks of your appointment an employee approaches you and advises you that they have been unsuccessful in obtaining authorisation for certain medical costs from the group medical scheme of the company since the filing for business rescue has taken place. The employee informs you that the medical scheme has indicated that due to non-payment of the deductions relating to the medical scheme by the company, that all of the benefits to employees under the scheme have been suspended. What would your advice to the employee be in relation to this issue?

- (a) Unfortunately, the employee would need to make payment of the outstanding amounts due to the medical scheme in order for the employee to enjoy further benefits from the group medical scheme.
- (b) As the benefits under the group medical scheme have been suspended, an alternative medical scheme would need to be sought by each employee, for the period of business rescue.
- (c) The group medical scheme, which exists for the benefit of both past or present employees of the company, would have an unsecured claim in the business rescue proceedings for the amounts that were not paid to the group medical scheme immediately prior to the commencement of business rescue proceedings and as such the medical scheme would not be entitled to suspend the benefits to such employees as the group medical scheme, as it is a creditor of the company in business rescue.
- (d) The group medical scheme would have a secured claim in the business rescue proceedings.
- (e) None of the above.

**Question 1.9**

Commented [M11]: 0 marks

Choose the **correct** statement:

The business rescue practitioner has an obligation to consult with creditors, other affected persons and the management of the company:

- (a) during the process of preparing a business rescue plan for consideration and adoption.
- (b) after preparing a business rescue plan for consideration and adoption.
- (c) before preparing a business rescue plan for consideration and adoption.

- (d) Both (a) and (c) are correct.

**Question 1.10**

Commented [M12]: 0 marks

Choose the **correct** statement:

You are a member of SARIPA and were certified by CIPC for the first-time last year to practice as a junior business rescue practitioner after you completed the INSOL SARIPA Programme in South African Business Rescue. Since then, you have accepted appointment as the business rescue practitioner of one small company and are busy implementing the business rescue plan that was adopted by creditors in that matter. You have been



approached by your brother-in-law to accept appointment as the business rescue practitioner of a large company that he is a director and shareholder of. Which of the below are appropriate?

- (i) You should not accept appointment as you have a conflict of interest.
- (ii) You can accept appointment.
- (iii) You should not accept the appointment as the company's business rescue practitioner as you are not independent.
- (iv) You should not accept appointment as you lack the necessary skills and do not meet the legislated criteria.

Your answer is:

- (a) (i).
- (b) (ii).
- (c) (iii).
- (d) Both (i) and (iii).
- (e) Both (iii) and (iv).

**Question 1.11**

Commented [M13]: 1 mark

Choose the **incorrect** statement:

- (a) The board of directors of the company can commence business rescue voluntarily by passing a board resolution, provided that it has reasonable grounds to believe that the company is financially distressed and there is a reasonable prospect of rescuing the company.
- (b) A creditor of a company can approach the High Court to place the company in business rescue, as long as the board of the company has not already adopted a resolution to begin business rescue proceedings.
- (c) As an affected person, an employee, an employee representative, a registered trade union, a shareholder or a director of a company can approach the High Court to place the company in business rescue, as long as the board of the company has not already adopted a resolution to begin business rescue proceedings.
- (d) Notwithstanding any financial distress, an affected person of a company may approach the High Court to place the company into business rescue provided that it is just and equitable to do so for financial reasons and there remains a reasonable prospect of rescuing the company.

**Question 1.12**

Commented [M14]: 1 mark

Choose the **correct** statement:

A foreign-domiciled unsecured creditor is owed money by a company in business rescue for services that it supplied to the company outside of South Africa before the company entered business rescue. The creditor is refusing to recognise the approved business rescue plan, refused to vote on the plan when called to do so, and is arguing that their claim is not compromised by the moratorium because their debt was established and is owed outside of South Africa. How should the business rescue practitioner treat this creditor and their claim?

- (a) Because the creditor is a foreign business, it is not bound by the approved business rescue plan and its claim is not affected by the moratorium. The business rescue practitioner must settle the creditor's claim in full in the normal course.
- (b) The creditor's claim is preferent to the claims of other South African unsecured creditors and will rank ahead of them in terms of the payment waterfall.
- (c) The creditor's claim is treated the same as all other unsecured creditors, whether the creditor is foreign or South African, and whether it chose to vote on the business rescue plan or not.
- (d) Business rescue is a South African legal process aimed at trying to save financially distressed South African businesses and, as such, the claims of any foreign creditors are automatically fully expunged upon the commencement of business rescue proceedings.
- (e) If there are foreign-domiciled creditors, the business rescue practitioner must produce two business rescue plans - one to deal with local South African creditors and the other to deal with foreign creditors.

**Question 1.13**

Commented [M15]: 1 mark

Choose the **correct** statement:

The company in business rescue's body of creditors includes the following claims (which have been accepted):

- Bank A: owed R60m and a fully secured creditor;
- 20 separate trade creditors: collectively owed R5m and unsecured;
- SARS: owed R5m in relation to income tax owing pre-business rescue and unsecured;
- Related / Inter-company X: owed R15m and unsecured;
- Party Y: owed R15m and which claim is subordinated in favour of all other creditors (an independent liquidation calculation valued this claim at R0);

All the above creditors attend the section 151 meeting to vote on the business rescue plan. However, only Bank A and Party Y vote in favour of the plan, with all other creditors (trade creditors, SARS and company X) voting against the plan. Has the plan been validly voted in / approved?

- (a) No: SARS's claim should be considered to be preferent and hence any vote is incorrect because of this obvious classification error.
- (b) Yes: The plan is voted in by virtue of 75% of all creditors voting in favour thereof (of which at least 50% of the independent creditors' voting interests were voted).
- (c) No: The plan is not voted in due to less than 75% of all creditors voting in favour thereof (despite the fact that more than 50% of the independent creditors' voting interests were voted).
- (d) No: 24 individual creditors in number (not value) voted and there were only 2 parties who voted in favour, therefore those voting against the plan far outweigh those voting in favour.

**Question 1.14**

Choose the **correct** statement:

Whilst section 150(c)(iv) does not require a cash flow statement or cash flow projections, best practice suggests that a cash flow should be presented. If presented, such a cash flow statement could explain to the reader:

- (a) The expected revenue (income) and expenses of the company, including depreciation and amortisation.
- (b) How expected cash receipts and payments are forecast to be received and paid respectively, that is, the liquidity of the company.
- (c) The financial position of the company as at the date of publication of the rescue plan.
- (d) All of the above.
- (e) Both (a) and (b) are correct.

**Question 1.15**

Choose the **correct** statement:

Per the Companies Act 2008, for what duration should the projections (statement of income and expenses and balance sheet) be prepared for in the business rescue plan?

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Commented [M17]: 1 mark

- (a) Three years from the commencement of business rescue proceedings.
- (b) One year from around the date of publication of the business rescue plan.
- (c) Three years from around the date of publication of the business rescue plan.
- (d) Any amount of time - this is at the discretion of the business rescue practitioner.
- (e) Only for the duration of the proceedings until substantial implementation has been achieved.

**Question 1.16**

Commented [M18]: 1 mark

Choose the **correct** statement:

The business rescue plan can, once adopted, be “crammed down” on:

- (a) The secured and unsecured creditors.
- (b) Only those creditors and shareholders who voted in favour of its adoption.
- (c) The creditors and shareholders who were present at the meeting in which the plan was adopted.
- (d) The creditors and shareholders who were not present at the meeting in which the plan was adopted.
- (e) The company, its shareholders, and the secured and unsecured creditors, regardless of whether or not they were present, or voted in favour of adopting the plan.

**Question 1.17**

Commented [M19]: 1 mark

Choose the **correct** statement:

A motor-vehicle of a company in business rescue is valued at R100,000.00. The same vehicle is the subject of the security of X Bank, who are still owed R50,000.00 for financing the vehicle.

The business rescue practitioner wishes to sell the vehicle in the normal course of business as it is no longer required for the operation of the business. What is the correct course of action for the business rescue practitioner?

- (a) Always obtain the consent of X bank before selling any asset.

(b) If the business rescue practitioner is sure that the proceeds of the sale will be sufficient to settle the claim of X Bank, then he can sell the vehicle without their consent and simply pay what is owed to X Bank when he receives the sale proceeds for the vehicle.

(c) Simply sell the vehicle at the best possible price to his brother.

(d) All of the above.

**Question 1.18**

Commented [M20]: 1 mark

Choose the **correct** statement:

During the business rescue proceedings of any company the business rescue practitioner has to consider a vast number of statutory obligations that the company must comply with. With regard to employees' statutory rights as contained in the Labour Relations Act, which of the following statements is correct:

(a) The Companies Act 2008 supersedes the Labour Relations Act and therefore the only rights of employees during business rescue proceedings are contained in the Companies Act 2008.

(b) The business rescue practitioner must have regard to section 5 of the Companies Act 2008 in the general interpretation of the Companies Act 2008. The provisions of the Companies Act 2008 and the Labour Relations Act apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions of the two Acts, without contravening the second. However, to the extent that it is impossible to apply or comply with one of the inconsistent provisions of the two Acts, without contravening the second, then the Labour Relations Act will prevail in the case of any inconsistencies.

(c) The business rescue practitioner must discount the provisions of the Companies Act 2008 and only rely on the provisions of the Labour Relations Act.

(d) The business rescue practitioner may elect to consider either the Labour Relations Act or the Companies Act 2008, however both cannot be interpreted concurrently.

(e) none of the above.

**Question 1.19**

Commented [M21]: 1 mark

Choose the **correct** statement:

If determined necessary, commencing a section 189 retrenchment process (in accordance with the provisions set forth in the Labour Relations Act), would be of significant benefit to most companies that have commenced business rescue, as this process is one of the

primary ways in which a financially distressed company can reduce overhead costs and operating expenditure. In this regard, when should a business rescue practitioner commence a section 189 process?

- (a) As soon as possible after the commencement of business rescue and the business rescue practitioner's appointment as practitioner. It is often a vital process in business rescue and should thus be prioritised as a critical procedure to be undertaken as soon after the commencement of business rescue as possible.
- (b) The business rescue practitioner is required to call for a vote on their intention to commence a section 189 process and this vote should be called at the first meeting of creditors convened in terms of section 147 of the Companies Act 2008. If the vote is passed by the requisite majority of creditors of the company, the business rescue practitioner should commence a section 189 process immediately after the vote has been passed in the section 147 first meeting of creditors.
- (c) The business rescue practitioner is required to include provisions regarding their intention to commence a section 189 process in the business rescue plan that they publish. The business rescue practitioner can only commence a section 189 retrenchment process if the business rescue plan contemplates the company commencing the process and only if it is duly approved and adopted by the requisite majority of creditors. Thus, the business rescue practitioner should only commence a section 189 process after publication of the plan and subsequent to the business rescue plan being voted on, approved and adopted by creditors.
- (d) The business rescue practitioner is legally permitted to commence a section 189 process at any time from the date of commencement of business rescue, but it must be initiated, and the requisite section 189 consulting period must be concluded, prior to the substantial implementation of the business rescue plan.

**Question 1.20**

Commented [M22]: 0 marks

Choose the **incorrect** statement:

If a business rescue practitioner is not appointed within five (5) business days after commencement of a company's voluntary business rescue:

- (a) The business rescue proceedings immediately end.
- (b) The business rescue resolution lapses and is a nullity.
- (c) The business rescue proceedings are not affected unless a court sets aside the resolution.
- (d) Approval of the business rescue plan will automatically cure this procedural error.

Where appropriate, refer to the case study below when answering the questions that follow.

#### CASE STUDY

##### **Khusela Entertainment Proprietary Limited**

Khusela Entertainment Proprietary Limited (**Khusela**) is a private company duly incorporated and registered as such under the applicable company laws of the Republic of South Africa (**South Africa**). Khusela has been operating as one of the largest record companies in South Africa for almost 30 years and has enjoyed great success and profitability through innovative branding, creative marketing and its management's ability to identify the latest trends in South African music and sign the greatest local talent. Leveraging off the influence and popularity of distinctively South African genres such as "Kwaito", "Gqom" and "Amapiano", Khusela has amassed a valuable catalogue comprising a multitude of well-known hits. Whilst Khusela's head office is located in Johannesburg, it operates recording studios in all major South African cities, including Polokwane, Durban, Pretoria, Mbombela, Bloemfontein, Gqeberha and Cape Town. For this purpose, Khusela has entered into various commercial lease agreements with Universal Properties Limited (**Universal Properties**), in terms of which studio space and recording equipment are leased from Universal Properties on a long-term basis. In order to facilitate artists' travel between the various recording studios, Khusela acquired a fleet of brand-new luxury mini-buses from Fast Cars Proprietary Limited under instalment sale agreements.

Over the past five years, Khusela has expanded rapidly in order to provide a complete service offering to its artists, music producers and promoters and consequently established a publishing division, an events management division as well as a record label called Soweto Music. As a result of this rapid expansion, Khusela incurred large amounts of high-interest debt by way of various financing arrangements with local banks and private equity firms. In addition to this, Khusela hired large amounts of employees in anticipation of increased demand resulting from its new service offerings. From having approximately 500 employees in 2015, Khusela's workforce (and its associated wage bill) quadrupled and comprised approximately 2,000 employees by the end of 2021. Khusela's employees are represented by the South African Entertainers Union (**SAEU**), a South African registered trade union that aims to safeguard the interests of musicians and entertainers, by advocating for fair labour practices and favourable working conditions for artists.

During the 2022 financial year, Khusela began to experience a substantial decrease in its operating revenue as a result of the following factors: (i) increased competition from new players in the South African music industry, (ii) the introduction of online platforms that allow artists to publish and distribute their music without the need to sign with a record label, and (iii) the increased tendency for up and coming artists to promote their music via social media platforms, as opposed to traditional means of marketing and promotion.

Due to the poor financial performance of Khusela during the 2022 financial year, Khusela's management went into panic mode and their immediate reaction was to pump additional capital into the business, in order to expand its service offering even further. As part of this capital-raising strategy, Khusela (i) entered into a revolving credit facility agreement with Crypto Bank Limited, in terms of which Khusela acquired a revolving credit facility in an aggregate amount equal to R100,000,000 against security in the form of a cession of book debts and a cession of all of Khusela's rights under its material distribution agreements, (ii) refinanced its existing debt (on more onerous and somewhat prejudicial terms) with Old Money Investment Corporation, a South African private equity firm, against the provision of additional security in the form of a mortgage bond registered over Khusela's head office and a deed of hypothecation over Khusela's registered trademarks, and (iii) initiated a rights offer in terms of which Khusela's existing shareholders acquired additional shares in the ordinary share capital of Khusela, and pursuant to which approximately R30,000,000 in additional equity was raised.

After acquiring additional capital to fund its business, Khusela's outlook in the short term seemed positive. However, it quickly became apparent to Khusela's Chief Financial Officer, Mr Kabelo Mogale and its Chief Executive Officer, Mr Themba Sithole, that whilst there was a noticeable increase in profits (as reflected in the latest management accounts), the likelihood of Khusela becoming overindebted in the long-term remained. For this reason, Kabelo and Themba set out to obtain legal advice from Best Law Inc on the options available to companies experiencing financial distress, as a precautionary measure. In particular, they wished to understand the entry routes into the South African business rescue process and the prescribed statutory requirements for each route.

In the midst of their financial uncertainty, and just as Khusela began to recover from its financial decline, a group of Khusela's biggest artists (and largest contributors of revenue), announced that they wished to leave Khusela's record label, reclaim their master rights, and go independent. This decision resulted in significant cash shortfalls given that Khusela experienced a substantial and unexpected reduction in its revenue streams. This "liquidity crisis" culminated in Khusela being unable to service its debt obligations and pay its overheads at the beginning of the year 2023. It then became clear to Khusela's board of directors that it appeared to be reasonably unlikely that the company would be able to pay its debts as they became due and payable in the ordinary course, and at this point, Khusela's draft financial statements indicated that the company's liabilities exceeded its assets.

Whilst Khusela's board of directors were contemplating the options available to them, the company was not able to pay its critical suppliers, landlords and its employees' salaries. As a result, certain creditors began taking legal action to recover the amounts owing to them, and in this regard:



- (i) Opera Sound Engineering Services Proprietary Limited (**Opera Sound Engineering**) issued a money judgment application in the High Court of South Africa KwaZulu-Natal Division, Durban against Khusela, in terms of which it claimed certain amounts owing by Khusela pursuant to repairs carried out by it at one of Khusela's studios;
- (ii) World of Music Proprietary Limited had begun preparing a liquidation application, on the basis that Khusela ought to be deemed to be unable to pay its debts;
- (iii) Fast Cars Proprietary Limited threatened to cancel the instalment sale agreements entered into with Khusela, as a result of Khusela's failure to pay instalments under the relevant instalment sale agreements; and
- (iv) In addition to the abovementioned legal steps, Universal Properties, one of Khusela's landlords and a creditor that was owed in excess of R20,000,000 in arrear rentals, sought legal advice and subsequently brought an application in the High Court of South Africa Gauteng Local Division, Johannesburg as an "affected person" to place the company under supervision and commence business rescue proceedings. In its business rescue application, Universal Properties nominated Ms Sarah van Zyl (a senior practitioner) for appointment as the business rescue practitioner of Khusela. After considering the business rescue application brought by Universal Properties, the High Court granted an order placing Khusela into business rescue and made a further order appointing Ms Sarah van Zyl as interim business rescue practitioner.

In light of the fact that salaries remained unpaid for a substantial period of time, and given that Khusela was subsequently placed into business rescue, the employees of Khusela were uncertain about what they could expect and wished to obtain the following legal advice:

- (i) whether their position in business rescue was more advantageous than if Khusela was put into liquidation;
- (ii) whether they (as employees) have any statutory rights to participate in the business rescue proceedings;
- (iii) a breakdown of the status of their claims in respect of unpaid salaries (both pre-business rescue and post-business rescue), in terms of the provisions of the Companies Act 2008 (**Companies Act 2008**);
- (iv) whether the business rescue practitioner may unilaterally amend and vary their employment terms and conditions; and
- (v) whether they may be validly retrenched in terms of the applicable labour laws of South Africa read with the Companies Act 2008.

The employees of Khusela obtained a detailed legal opinion from insolvency and restructuring law experts on the aforementioned issues.

Following her appointment, Ms Sarah van Zyl immediately assumed full management control of Khusela and scheduled a first meeting of creditors. At the first meeting of creditors, Ms Sarah van Zyl's appointment was ratified in the manner prescribed by the Companies Act 2008 and thereafter she began to investigate the affairs of Khusela, with the view of developing a business rescue plan.

During the course of Sarah's investigations, she was approached by Themba Sithole (the CEO of Khusela) who informed her that he had previously bound himself as surety for the debts of Khusela under the initial funding transaction entered into with Old Money Investment Corporation in the year 2019. Themba was curious to know whether his obligations under the deed of suretyship had been extinguished by virtue of the fact that Khusela was placed into business rescue proceedings. Sarah addressed a letter to Themba setting out the status of Themba's obligations under the deed of suretyship in light of relevant case law.

In relation to the various contracts concluded by Khusela with its various suppliers and landlords (prior to the commencement of business rescue proceedings), Sarah was uncertain as to whether she was able to suspend and / or cancel prejudicial contracts. She recalls from legal advice that she obtained previously that the Companies Act 2008 gives business rescue practitioners the ability to suspend or cancel prejudicial contracts, but she is uncertain as to how this may be done practically. Consequently, Sarah reached out to Best Law Inc and requested them to prepare a brief legal opinion dealing with the suspension or cancellation of prejudicial contracts in the business rescue context.

Following her investigations into the business and affairs of Khusela, Sarah was of the view that Khusela was capable of being rescued, particularly in view of Khusela's established brand and goodwill that it has in the South African music industry. She immediately sets out to secure post-commencement financing to keep the company afloat, whilst Khusela's business rescue plan was being prepared and drafted for consideration by creditors.

The business rescue plan of Khusela was eventually published a year after Sarah was appointed as the business rescue practitioner. The business rescue plan was subsequently put to a vote at a meeting of creditors held in terms of section 151 of the Companies Act. The business rescue plan of Khusela was supported by the requisite majority of creditors and was finally adopted.

Opera Sound Engineering, a minority creditor, voted against the adoption of the business rescue plan, as its board of directors was of the view that there were no reasonable prospects of Khusela being rescued. The board of Opera Sound Engineering was further of the view that the approved business rescue plan was not binding on Opera Sound Engineering at all, given that it had voted against the adoption of the business rescue plan.

Sarah proceeded to implement Khusela's approved business rescue plan. The business rescue proceedings of Khusela continued over a prolonged period of time and eventually it became clear that the business rescue plan was not capable of being implemented in its initial form. Sarah consequently amended Khusela's business rescue plan unilaterally and circulated a notice to creditors informing them of such amendments. The provisions of the amended business rescue plan were prejudicial to the interests of Crypto Bank Limited and Old Money Investment Corporation. Accordingly, both Crypto Bank Limited and Old Money Investment Corporation initiated joint legal proceedings to have Sarah removed as the business rescue practitioner. The application to remove Sarah as the business rescue practitioner was unsuccessful.

Ultimately, despite the best efforts of Ms Sarah van Zyl and Khusela's board of directors, it was determined that Khusela was not capable of being rescued. Accordingly, Ms Sarah van Zyl proceeded to take the necessary steps to place Khusela into liquidation.

#### Question 2

It is recorded in the case study that "certain creditors began taking legal action to recover the amounts owing to them". Briefly discuss the enforceability of legal proceedings in light of Khusela's ongoing business rescue proceedings. (2)

One of the critical tools included in Chapter 6 in order to achieve the objectives of Business Rescue is the general moratorium. This tool is set out and dealt with in the Companies Act of 2008 under section 133, and more specifically section 133(1). The key principle included in section 133(1) is that the general moratorium provides for a period protection for the company from all legal proceedings against it, giving it and the BRP breathing space to restructure the company.

With the commencement of the business rescue proceedings of Khusela, this moratorium applies to all existing legal proceedings as well as the legal proceedings aimed at by Opera Sound Engineering (money judgement) and World of Music (Pty) Ltd (liquidation application). This protection would not however extend to the threatened cancellation by Fast Cars Limited.

**Commented [M23]:** 1 mark out of 2. Did not discuss the instances when the moratorium would not apply, i.e. where the BRP consents to the legal proceedings, or where the leave of the court is obtained.

### Question 3

What is the requisite majority of creditors' support that is required for a business rescue plan to be adopted? (3)

For a business rescue plan to be adopted at a meeting convened under section 151, it must meet the conditions set out in section 152.

In particular, a business rescue plan is deemed to be approved when:

- a. It is supported by 75% of the creditors' voting interests that voted (either in the form of ballots or exercised by proxy); **AND**
- b. At least 50% of the independent creditors, who participated in the vote, voted in favor.

To the extent that the business plan does not provision for the altering of the rights of shareholders, and it meets the criteria set out above, it is deemed to have been finally adopted. If, however, the plan does provide for the altering of rights of shareholders, then the BRP needs to convene a shareholder meeting for the consideration of the plan subsequent to the creditor meeting convened. In this meeting only a simple majority is required in favor of the plan.

### Question 4

It is mentioned that Opera Sound Engineering voted against the business rescue plan. Is the approved business rescue plan binding on Opera Sound Engineering? Substantiate your answer with authority. (3)

Although Opera Sound Engineering voted against the plan, the approved business rescue plan is binding on it as well. This is known as the "cram-down" principle. The aim behind this mechanism is to prevent / minimize abusive and / or arbitrary interference and obstruction of the restructuring of a company by creditors.

This mechanism is set out under section 152(4), where it states that the adopted plan is binding on the company and each of the creditors, irrespective of the fact whether the creditors were present at the meeting or how they voted on plan.

The mechanism has subsequently been entrenched through case law such DH Brothers Industries (Pty) Ltd v Gribnitz NO and others (limit on the % of dissenting creditors and absent parties to 25%) as well as Africa Banking Corporation of Botswana Ltd vs Kariba Furniture Manufacturers (Pty) Ltd and Others (noting the indispensable nature of the cram-down to affect a successful business rescue plan).

Commented [M24]: 3 out of 3 marks.

Commented [M25]: 3 out of 3 marks.

### Question 5

Considering the fact that Khusela was already unable to pay its debts at the time of the application to place it in business rescue, explain whether the requirement of financial distress as defined in the Companies Act 2008 was met, or whether it was too late for a business rescue order to be issued. (5)

The Companies Act 2008 defines financial distress under section 128(1)(f) as:

- a) A company being reasonably unlikely to be able to pay all of its debts as they become due over the immediately ensuing six months (commercial insolvency); OR
- b) It is reasonably likely that the company will become insolvent within the immediately following six months (factual insolvency).

Whilst to the tests used to determine financial distress, especially commercial insolvency, is forward looking, a company that is already commercially insolvent at the time of considering business rescue can nevertheless meet the definitions of financial distress.

The above principle has been set out by the SCA in the Oakdene Square Properties (PTY) Ltd v Farm Bothasfontain (Kyalami) (Pty) Ltd case. In such cases where the company meets the requirements for both BR and liquidation a careful consideration of the respective facts is required.

As the business rescue application under the Khusela case study emanates not from a voluntary company side application (section 129), but rather a court application brought by an affected party (section 131) special cognizance needs to be made of section 131(4) where, in addition to a reasonable prospect of success, three alternate conditions are given for entry into business rescue. Under section 131(4)(a)(ii) this also includes companies that have already failed to over due amounts.

As such it was not too late for a business rescue order to be issued.

### Question 6

What effect - if any - would the application for Khusela to be placed in business rescue have on the application by World of Music for the company to be placed in liquidation had this application (for liquidation) already been filed at the High Court at the time? (5)

Similarly as under question 5 above one needs to consider if we are dealing with a voluntary (s129) or court ordered (s131) business rescue process in order to determine the relevant facts.

Under a section 129 application, the board of a company may not adopt the required resolution to commence business rescue if liquidation proceedings have been initiated against the company (s129(2)(a)). The meaning of the term initiated was expanded on in the case of Pan Africa Shopfitters (Pty) Ltd v Edcon Ltd and Others, where it was held that

**Commented [M26]:** 2 marks out of 5. Needed to discuss the principles in *Gormley v West City Precinct Properties (Pty) Ltd* and *FirstRand Bank v Lodhi 5 Properties Investment*. Needed to discuss the 'just and equitable' ground for a BR order (Tyre Corporation case).

**Commented [M27]:** 1 mark out of 5. Needed to discuss relevant case law ie. *Lutchman NO v African Global Holdings*, *ABSA Bank Limited v Summer Lodge* and *Standard Bank of South Africa v A-Team Trading CC*. Also needed to mention that the issue for consideration is whether a pending liquidation application should be regarded as part of liquidation proceedings prior to the application being heard in court.

initiated means that a liquidation application has been issued and served on the company (principle that a litigant is only affected in law once he is formally aware of the action being taken against him).

As the liquidation may be filled, but not yet served on the company, it can be argued that liquidation application by World of Music will have no effect on the business rescue application.

The case of the court ordered business rescue process that we have on hand here is more clear cut, as the section 131(6) expressly provides for the suspension of the liquidation proceedings until such time that the court has been in a position to adjudicate on the BR application or the business rescue proceedings end. It needs to be noted here the term of the liquidation application refers to all stages of the winding-up process up to an before the final dissolution of the company.

As such the liquidation application of World of Music will have no effect on the business rescue proceedings based on the facts of the Khusela case study.

#### **Question 7**

In addition to the cession of books debts in favour of Crypto Bank, it also insisted and thereafter registered a general notarial bond over the movable assets of Khusela.

Ms Sarah van Zyl identified a large amount of redundant equipment and even a few unroadworthy old vehicles that could be sold urgently in order to fund the ongoing operation cost of Khusela during business rescue.

Crypto Bank came to hear of Sarah van Zyl's intention to sell these assets and addressed a letter to her via their attorneys threatening to launch an urgent Court application to interdict her from selling the assets subject to their security, without their consent.

#### **Question 7.1**

Sarah Van Zyl approaches her lawyers at Best Law Inc for advice on what the legal position of Crypto Bank with regard to the general notarial bond, and her prospects of success in opposing the threatened urgent application. As an experienced lawyer at Best Law Inc advise Sarah van Zyl on whether or not she is entitled to sell the assets in question without Crypto Bank's consent. **(2)**

By having obtained a general notarial bond over the movable assets of Khusela, Crypto Bank has obtained a clear security interest for its pre-commencement debts. This brings into play section 134, which deals with the protection of property interest.

**Commented [M28]:** 0 marks out of 2. See page 75 of the Course Notes.

More specifically, section 134(3) states that the BRP may only dispose of assets, which are subject to the security or title interest of another party, with the express consent of this party. As such, Crypto Bank would be able to oppose the sale of the assets.

However, this does not apply if the BRP can show that the proceeds of the assets would be sufficient to extinguish the debt of Crypto Bank. Under these circumstances the BRP is however required to pay over the proceeds to Crypto Bank promptly.

#### Question 7.2

Commented [M29]: 4 marks.

-If Sarah van Zyl is in a position to sell the assets, what would the requirements for such disposal be? (4)

If Sarah were able to sell assets, this would result from one of three alternative requirements included in section 134. Namely, the disposal is:

- a) In the ordinary course of business; or
- b) In a bona fide transaction at arm's length, for fair value and approved in advance in writing by the practitioner; or
- c) A disposal transactions as included in the implementation of an adopted business rescue plan under section 152

Ordinary course of business: Whilst the term is not specifically defined in the act, reference should be made to Insolvency Act and the existing facts. Especially with regards to nature of the operations of the company and whether comparable transactions would have been concluded at substantially similar conditions between parties that are not financially distressed.

Bona fide transactions: This applies to disposals of such assets as non-core ones. In reference to Levenstein 9-52(2) these transactions should i) not be simulated transactions with suspect relationships between the parties, ii) be for fair market value of the asset being disposed off between willing parties, and be approved in writing by the BRP prior to the transaction.

Disposal as part of the implementation of an approved plan: The disposal of assets (such as divisions etc.) needs to have been part of a duly approved business rescue plan.

#### Question 8

Commented [M30]: 4.5 marks. Needed to state the applicable legal provision in full and also state that "security could be provided for the amount of the proceeds to the reasonable satisfaction of Crypto Bank".

Sarah Van Zyl approaches Easy Access PCF, a well-known provider of funding to distressed businesses, for a loan to fund the expected operational losses during business rescue. After a short due diligence, Easy Access PCF indicate that they are willing to provide post commencement funding of R1,000,000 subject to Sarah agreeing to sell to them the proceeds of Khusela's existing material distribution agreements and the proceeds being paid to them directly until such time as the post commencement finance is repaid in full.

Advise Sarah van Zyl under which circumstances she can agree to Easy Access's requirements considering that the rights to these agreements have already been ceded to Crypto Bank. **(5)**

Section 135 of the act deals with post-commencement finance, and with the ability of the company to raise finance to assist it to restructure its affairs (section 135(2)). Whilst PCF funding is given a preferential treatment in ranking, PCF funding obtained from sources other than employees can be secured with the help unencumbered assets.

As the assets requested by Easy Access PCF have already been provided as security to Crypto Bank, As such Crypto Bank enjoys the protection of its security interests under section 134(3), requiring the BRP to approach Crypto Bank for consent if she wishes to sell the assets in questions.

As per section 134(3)(a) this can be avoided if the sales proceeds of the assets exceed the debt owed to Crypto Bank. In a situation where Crypto Bank is materially over-secured vis a vis its exposure, it can make sense for the BRP to sell the assets / utilize them as security to maximize the value extraction from assets to ensure a successful turnaround.

Alternatively, one additional way to release the security provided to Crypto Bank is if the claim of Crypto Bank becomes compromised in terms of section 154(1) or unenforceable as per section 154(2), in which case the security will have to be released, freeing it up for the PCF provider. However, given the critical need for cash during business rescue process from the first moment on, this is usually not a viable option.



### Question 9

The business rescue practitioner of Khusela Entertainment (Pty) Ltd was faced with a work force of over 2,000 employees at the commencement of the business rescue proceedings. Within the first week of business rescue proceedings having commenced, the business rescue practitioner identified the need to embark on a retrenchment process with more than fifty percent (50%) of the employees of Khusela Entertainment (Pty) Ltd, for operational considerations. The business rescue practitioner, being a prudent and careful business rescue practitioner, immediately embarked on a section 189 consultative process with the affected employees of Khusela Entertainment (Pty) Ltd, in terms of the relevant provisions of the Labour Relations Act. The first consultation took place two weeks after the commencement of business rescue proceedings, with the various consultative meetings taking more than 60 days to complete and, eventually, more than 1,500 employees of Khusela Entertainment (Pty) Ltd were retrenched for operational considerations during the business rescue proceedings.

Despite the negative impact this had on the employees who were retrenched, the business rescue practitioner ensured that the cash flow for the business was restored to a manageable level for the business, the employees were paid their severance packages, and the business rescue practitioner felt that the correct decisions were made pursuant to the consultative process with the employees.

This retrenchment process and the resultant cash flow relief paved the way for the business rescue practitioner to draft the proposed business rescue plan, which was published after the section 189 process was finalised.

In light of the rights of employees and the current case law on this subject, discuss whether the business rescue practitioner followed the correct process and procedure in this case. (7)

In the case presented here the business rescue practitioner did not follow the correct process.

Section 7 of the Companies Act 2008 looks at the purpose of the Act, and specifically the need to balance the rights and interests of stakeholders during the rescue of financially distressed companies.

Section 136(1)(b) takes this protection of employees further, by ensuring that employees of company at the time of the commencement of business rescue proceedings continue to be employed on the same terms and conditions.

To amend these terms and conditions, the business rescue practitioner must comply with relevant legislation, which in this case is section 189 and 189A of the Labour Relations Act 1995 (as well as other relevant legislation). This requires that before retrenchments can be commenced, the requisite consultations first need to be had.

**Commented [M31]:** 3 marks out of 7. Needed to discuss the fact that the BRP may commence with a section 189 process in the absence of a collective agreement that allows for a reduction in salaries and benefits. Needed to describe what the section 189 process entails. Needed to state that the BRP could issue voluntary severance offers to all affected employees, subject to any collective agreements.

In the case South African Airways SOC Ltd and Others v National Union of Metalworkers of South Africa obo members and Others the court determined that section 136(1)(b) necessitates that all retrenchments must be dealt with and voted upon as part of the business rescue. The court further clarified that Chapter 6 does not provide any unilateral powers for the BRP to retrench employees prior to the adoption of the business rescue plan.

In addition, as the retrenchments cover more than 50% of the work force, the BRP needs to assure herself that there are no bargaining and other agreements between the company and union that would prohibit such material incisions, as such agreements remain in force despite the business rescue proceedings.

Having proceeded in contravention of section 136(1)(b) as well as the SAA judgement, the BRP is exposed to potential relief sought by retrenched employees through the Labour Court.

#### Question 10

Discuss the general rights held, if any, by the employees of Khusela during the business rescue process of Khusela. (3)

Chapter 6 of the Companies Act 2008 provides for and protects the rights of employees during a business rescue process through several sections:

Section 135 (Post Commencement Finance): Section 135(1) looks at remuneration and reimbursements becoming due to employees post commencement, conferring onto the employees special preference over other PCF providers. It should be noted that this preference continues to be conferred upon liquidation of the company.

Sections 136 (Effect of business rescue on employees and contracts): Especially section 136(1)(a) and section 136(1)(b) deals with the rights of employees to the maintenance of their existing conditions of employment (pre BR) as well as ensuring that any variations to their employment contracts under section 189 and 189A of the Labour Relations Act 1995, can only be contemplated within the context of a business rescue plan, where they have a right to be consulted, provide input and vote on the adoption of the plan.

Section 144 (Rights of employees): The above mentioned right to participate in the business rescue process is further entrenched under section 144(1), in addition to the conferring of preferred unsecured status for amounts owed to them by the company prior to the commencement of the business rescue proceedings.

#### Question 11

Commented [M32]: 3 marks.

Commented [M33]: 1 mark. Needed to discuss the fact that directors are relieved of certain of their fiduciary duties to the extent that they act according to the BRP's instructions and subject to his/her instructions. Needed to apply the legal principles to the facts.

Discuss whether Mr Themba Sithole (the Chief Executive Officer), (ii) Mr Kabelo Mogale (the Chief Financial Officer) and (iii) the board of directors would have had any role during the business rescue process of Khusela. (3)

Under normal circumstances sections 66(1) of the Companies Act 2008 provides for the governance and management powers reside with the board of directors (to the extent not provisioned for differently elsewhere in the act or in the company's MOI.

In business rescue however, these powers are fully assumed by the business rescue practitioner. However, directors are not absolved of the duty to exercise their roles, as they owe a duty to the company to exercise any management function in accordance with the instructions of the BRP. These duties, covered under section 142, include:

- (i) To attend to the reasonable requests of the BRP;
- (ii) Provide information on the affairs of the company;
- (iii) Deliver all company books in their possession to the BRP as soon as possible on commencement of the business rescue process; and
- (iv) Within 5 days of the commencement of the business rescue process provide a statement of affairs the BRP covering all material transactions over the previous 12 months

In addition, the directors remain bound by the requirements as set out in the Companies Act 2008 under section 75 (covered under section 137).

#### Question 12

Ms Sarah Van Zyl would have had an obligation to consult with creditors, other affected persons, and the management of Khusela before preparing a business rescue plan for consideration. With reference to case law, what should the term "consultation" entail in this context? (5)

The BRP has an obligation to consult with the affected parties before and during the preparation of the business rescue plan

The degree of consultation required has been substantiated through several cases, such as Hlumisa Investments Holdings (RF Ltd) and Another v Van der Merwe NO and Others. This case looked the distinction between what can be considered merely "informing" vs what would be true "consulting".

In drawing on the Scalabrini matter ((opined on by Rogers J), the case determined that consultation needs to be characterized by a genuine invitation to the affected parties to provide advice coupled with an equally genuine intention to receive and consider such advice.

Thus, consultation cannot be treated as a pure formality, but must be made in the context of the BRP not being exceedingly fixed in its decisions prior to consultation. Such a scenario would not serve to meet the requirement of true consultation.

**Commented [M34]:** 4 out of 5. Needed to state that the procedure for consultation must be one which enables consultation in the substantive sense to occur.

The above requires the BRP to meaningfully engage with the affected parties, such that she takes their advice and input into account in drafting the plan. Performing mere acts of keeping the affected parties informed is thus insufficient.

**Question 13**

**Commented [M35]:** 2 marks.

Discuss whether Ms Sarah Van Zyl could propose an agreement with Khusela providing for further remuneration in addition to what is permitted by the government-regulated tariff, and who would have to approve such proposal? **(2)**

Section 143 sets out the remuneration of the business rescue practitioner, and continues under section 143(2) to allow the BRP to propose an agreement for further remuneration over and above the prescribed tariffs under section 143(6).

Under section 143(2) this can include a calculation based on a contingency related to:

- a. The adoption of the plan at all, or within a particular time...;
- b. The attainment of any particular result or combination of results...

For such an agreement to become binding it needs to pass a majority vote of creditors in accordance with section 145 (4) to (6) and a majority vote of holders of voting rights attached to any shares in the company that are entitled the holder to a portion of the residual value of the company on winding-up.

These votes need to be collected during a meeting convened for the purpose of considering the proposed remuneration proposal.

**Question 14**

**Commented [M36]:** 3 marks.

Is Khusela Entertainment a small, medium or large company, and what is the tariff rate per hour that Ms Sarah van Zyl can charge for her services as business rescue practitioner? Base your answer on the information provided and assume no significant changes between the dates set out in the case study and the date of commencement of business rescue. **(3)**

To determine the size classification of the company, reference needs to be made to the regulations 127(2) and 26(2), which provide for the components required in determining the company score.

A company is considered small if the composite score is below 100, is considered medium if this score is between 100 and 500, and is considered large if the score is above 500 points.

Looking at the first determining factor, the average number of employees during the financial year (1 point for each employee) we can see that, assuming the average number of employees during the 2023 financial year has not changed materially from the approximate 2000 at the end of the 2021 financial year, the company score would be well

in excess of the 500 point limit (even before taking into consideration the level of third party debt, turnover and number of members with a beneficial interest.

As such the applicable tariff would be that of large company - namely R2 000 per hour up to a maximum of R25 000 per day (inclusive of VAT).

#### **Question 15**

The case study includes the following statements:

"At the first meeting of creditors, Ms Sarah van Zyl's appointment was ratified in the manner prescribed by the Companies Act and thereafter she began to investigate the affairs of Khusela."

and

"Following her investigations into the business and affairs of Khusela, Sarah was of the view that Khusela was capable of being rescued."

Read together these statements indicate that Sarah may not have complied with the Companies Act 2008 in performing her duties as the business rescue practitioner of Khusela Entertainment. Identify the section of the Act that may not have been complied with and explain why and what should have been done differently. **(3)**

Section 140 of the Companies Act 2008 deals with the general powers and duties of business rescue practitioners (whether appointed under section 129 or section 131.

Under section 140(1A) the act goes on to prescribe that the BRP must as soon as is practicable after having been appointed, inform all applicable regulatory authorities (applicable in the sense of having authority in terms of the activities of the company) that the company has been placed in business rescue as well as of her appointment as business rescue practitioner

The facts of the case study do not indicate if this requirement has been met, potentially indicating non-compliance with the act on the part of the BRP in this instance.

In addition, section 141 (dealing with the investigation of the affairs of the company, requires the BRP to start the investigation of the affairs as soon as practicable after appointment. In particular in order to determine whether there is a reasonable prospect to rescue the company (section 141(1)).

The BRP merely determined that the company can be rescued, based on the statements included in the case study. The BRP may be non-compliant here in the assessment of whether the company can be rescued, as her assessment appears to be too superficial to support a factual evaluation of "reasonable" prospect of success. This exposed her to an

**Commented [M37]:** 1 mark. The question required you to determine whether there was any non-compliance with the Companies Act in view of the first meeting of creditors and the BRP's determination that Khusela was capable of being rescued. Therefore, section 147(1)(b) was to be discussed.

application to the court by an affected party to have her removed in term of section 139(2)(b).

Lastly, whilst the facts of the case study as well as the included statements make reference to the BRP convening a first meeting of creditors in terms of section 147(1) within 10 business days of being appointed, there is no reference to whether the BRP convened a first meeting of employees representatives under section 148(1) within 10 business days of being appointed.

#### **Question 16**

The business rescue plan was published almost a year after the commencement of business rescue proceedings. The delay would have triggered a number of duties or obligations on the business rescue practitioner. List these and identify the relevant section of the Act that creates the obligation or duty. **(4)**

The relevant section of the Companies Act 2008 that needs to be applied here is that of section 132 dealing with the duration of business rescue proceedings.

Under section 132(3) sets out that, should the business rescue proceedings not have ended within a period of three months from the start of the business rescue proceedings (or any longer period the court may allow upon application by the BRP), then the business rescue practitioner is required to:

- a. Prepare a report in the status and progress of the BR proceedings as well as update this report at the end of every subsequent month, for the duration of the proceedings; and
- b. Deliver the report as well as each subsequent update in the prescribed manner to each and every affected party as well as the court (if the BR proceedings were commenced by court order or to the Commission in every other case
- c. In addition, each report iteration must be submitted with the addition of duly completed CoR 125.1 form.

**Commented [M38]:** 2 marks. Needed to mention section 150(5) - securing an extension of time to publish the BR plan.

### Question 17

Mr Sandiso Siwisa, who is the cousin of the one of the directors of Khusela, owns 25% of the issued share capital of Khusela. Mr Siwisa's half-sister, Mrs Lungi Phillips, owns 26% of the issued share capital of Khusela. There is only one class of shares and each share affords a shareholder one vote.

Mr Siwisa is also a creditor of Khusela by virtue of a R500,000 loan made to Khusela when it urgently needed cash during 2022.

Is Mr Siwisa an independent creditor of Khusela? Provide full reasons for your answer. (5)

The Companies Act 2008 sets out the definition of an independent creditor as i) one that is a creditor of the company (including an employee as per section 144(2) AND ii) is not related to the company, the directors or the BRP (subject to section 128(2))

By virtue of having provided a loan to Khusela during 2022, Mr Siwisa is a creditor of the company. However, given his family relation to one of the directors of Khusela does not confer onto him the status of an independent creditor. This does however provide Mr. Siwisa with a voting right as creditor by virtue of his shareholder vote. This vote will however not count towards the requirement of at least 50% of independent creditors approving the plan under section 152(2)(b).

### Question 18

Comment on the validity of the business rescue practitioner, Sarah van Zyl, having the "ability" to unilaterally amend the business rescue plan. Also discuss the requirements of implementing an amendment to the business rescue plan with reference to the Companies Act 2008 and appropriate case law. (8)

The business rescue practitioner does not have the ability to unilaterally amend the business rescue plan after the adoption of the plan.

These specific circumstances were dealt with by the court in the case *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd* (in business rescue) and *Another*. Although in the rarest of cases does the implementation of an approved business rescue follow the plan of the business rescue practitioner, the court held that the intention of the act does not provide for the right of the BRP to unilaterally amend an approved plan, as this would be a circumvention of the requirements and procedures set out in Chapter 6 as well as the Companies Act 2008 more broadly. The courts held that it cannot be the case that the BRP has the power or means to impose a plan on the affected parties that has not been voted on as set out in section 152 (also with a view to the rights of affected parties granted under sections 145 and 146).

Amendments to the business rescue plan are possible though, in particular when a proposed plan fails to be adopted in terms section 152 at a section 151 meeting. In this instance it is section 153 that comes to bear on the business rescue process and provides that as per section 151(1) the BRP must either:

**Commented [M39]:** 2 marks. Needed to discuss the definition of "related" and the provisions of section 2(1)(a) to (c) of the Companies Act. Needed to demonstrate why Mr Siwisa is not an independent creditor with reference to the Companies Act.

**Commented [M40]:** 4 marks out of 8. Needed to discuss the steps that Sarah could take to amend the BR plan in terms of applicable case law. This includes publishing the amended plan, calling a meeting to vote on the plan, etc.

- Request a vote from all holders of voting interests to have the BRP prepare a revised plan and publish the same; or
- Inform the section 151 meeting that the company will apply to the courts to have the votes set aside rejecting the plan on the basis that these were inappropriate.

In addition, the section provides the right for affected persons to, should the BRP not take one of the above steps, to in their own right (if present at the meeting):

- Request a vote from all holders of voting interests to have the BRP prepare a revised plan and publish the same;
- Apply to the court to have the dissenting votes set aside on the basis that they were in appropriate; or
- Make binding offers to purchase the voting interests of dissenting affected parties.

Section 153(3) goes on to require, should a vote to amend the plan be passed to i) conclude the meeting after the vote, ii) prepare and publish the revised plan within 10 business days. It should be noted also that, if a vote is passed to revise the plan, sections 151, 152 as well as 153 will apply again as was with the publication of the initial plan.

In the case that no remedy of an unsuccessful vote should be achieved, as envisioned under section 153, the BRP must promptly file a notice of termination of the business rescue plan. In the case of *Commissioner of South African Revenue Services v Primrose Gold Mines (Pty) Ltd and Others*, the courts held that only upon filing of the termination notice does the business rescue process become terminated (and not at the time of the plan rejection).

#### Question 19

Commented [M41]: 2 out of 3 marks.

Placing yourself in the shoes of Opera Sound Engineering, explain three key items you would expect to see in the financial projections of the business rescue plan to assist you to vote in the business rescue of Khusela. **(3)**

1. Key variables: A description of how key variables underpinning the financial projections have been determined, such turnover (units sold and average prices), cost structure and composition of variable and fixed costs, inclusion of realistic working capital requirements. This aids Opera in determining the achievability of the projections and thus form an opinion of the prospect of success of the plan;
2. Assumptions: Sufficiently detailed description of the underlying assumptions such as growth parameters, strategic business model assumptions and assumptions relating to the access to and use of fresh funds
3. Cash flows: A detailed explanation of the sources and uses of cash flows which are to be used for dividend payment against creditor claims under the business rescue plan in the future in order to assess timing, reasonability and likely success;
4. Relevant alternative: Sufficiently detailed description and quantification of potential outcomes for creditors under the relevant alternative, should the business rescue plan not be approved.





**Question 20**

Ms Sarah van Zyl has asked you whether she should include a cash flow statement in her business rescue plan, as technically it is not required. What would your response be? **(2)**

Under section 150(2)(c)(iv), the act requires that the business rescue plan includes a projected balance sheet of the company in business rescue as well as a projected income statement for the ensuing three years.

Whilst the act does not expressly provision for the inclusion of a cash flow statement, the BRP should consider the inclusion of such especially liquidity is critical to the success of the rescue and is the preeminent determinant of financial health. In addition, the cash flow statement can provide key information for affected parties in considering whether to adopt the plan (such as material assumption of cash inflows and outflows as well as working capital requirements).

**Commented [M42]:** 2 marks.

**Question 21**

From the perspective of the employees, what are three advantages of Khusela being placed in business rescue rather than being liquidated? **(3)**

1. Employment contracts: Under business rescue these remain in place on the same terms and conditions as prior to BR, whilst under a liquidation the contracts of employment are suspended and are terminated through the passing of time and operation of law;
2. Preference of claims originating before BR: Under a liquidation, the preference accorded to employees pre BR claims is limited, with the balance only ranking as concurrent claims. Conversely, under business rescue these claims are afforded the ranking of preferent unsecured claims in their entirety.
3. Post commencement finance: Under section 135, the amounts owed to employees post commencement are considered PCF and thus enjoy preference over all other PCF claims, irrespective of securitisation.
4. In addition, section 144 also confers the right of employees to participate in the business rescue proceedings, a right which is not conferred in a comparable fashion during a liquidation.

**Commented [M43]:** 2 out of 3 marks.  
Employees are protected by labour law in context of business rescue / the Labour Relations Act is applicable to any dismissals for operational requirements.

**\*\*\* END OF ASSESSMENT \*\*\***

**TOTAL MARKS: 100**